FOR ARGUMENT

Nos. 78-253, 78-282 and 78-283

In the Supreme Court of the United States

OCTOBER TERM, 1978

NOLAN ESTES, ET AL., PETITIONERS

v.

METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., ET AL.

DONALD E. CURRY, ET AL., PETITIONERS

v.

METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., ET AL.

RALPH F. BRINEGAR, ET AL., PETITIONERS

v.

METROPOLITAN BRANCHES OF THE DALLAS N.A.A.C.P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

SARA SUN BEALE
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MILDRED M. MATESICH
Attorneys
Department of Justice
Washington, D.C. 20530

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QUESTIONS PRESENTED

1. Whether systemwide relief was warranted to eliminate the vestiges of Dallas' dual school system.

2. Whether the court of appeals erred in remanding the case for additional findings regarding the feasibility of reducing or eliminating the one-race schools not affected by the district court's remedial order.

INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibility with respect to school desegregation under Titles IV, VI, and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000b-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The Court's resolution of the issues presented in this case will affect that enforcement responsibility. The United States has participated either as a party or as amicus curiae in this Court's previous school desegregation cases, including *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *School Board of City of Richmond* v. *State Board of Education*, 412 U.S. 92 (1973); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Milliken* v. *Bradley*, 433 U.S. 267 (1977); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Columbus Board of Education* v. *Penick*, No. 78-610 (July 2, 1979); and *Dayton Board of Education* v. *Brinkman*, No. 78-627 (July 2, 1979).

STATEMENT

The Dallas Independent School District ("the DISD" or "the Board") is the eighth largest urban school district in the United States (Pet. App. 14a).[1] Its boundaries (which are not coterminous with the City of Dallas) embrace an area of about 351 square miles, and it has an enrollment of more than 130,000 students (Pet. App. 14a; Estes Br. 7).[2] Although a majority of the students in the DISD were Anglos when this suit was commenced in 1970, by the 1975-1976 school year, when the district court conducted hearings on relief, the student population was 41.1%

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[1] "Pet. App." refers to the petition filed in No. 78-253.

[2] "Estes Br." refers to the brief filed by the petitioners in No. 78-253, *Nolan Estes, et al.* v. *Metropolitan Branches of the N.A.A.C.P., et al.* We will refer to petitioners' brief in No. 78-282, *Donald E. Curry, et al.* v. *Metropolitan Branches of the Dallas N.A.A.C.P.*, as the "Curry Br.," and to petitioners' brief in No. 78-283, *Ralph F. Brinegar, et al.* v. *Metropolitan Branches of the Dallas N.A.A.C.P.*, as the "Brinegar Br."

Anglo, 44.5% black, 13.4% Mexican-American, and 1% other races (Pet. App. 13a-14a).[3]

A. The previous desegregation suits against the DISD

At the time of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), Dallas maintained a racially segregated school system required by state law.

In 1955 a group of black school children and their parents instituted litigation to desegregate the Dallas schools, and in 1960 the Fifth Circuit ordered the district court to require the Board to implement a stair-step plan, under which one grade per year would be removed from the dual educational structure and administered in a unitary fashion.[4] *Boson* v. *Rippy*,

[3] The earliest enrollment figures by race that the DISD has supplied are for the 1966-1967 school year.

In its earliest opinion, the court of appeals used the terms "white," "Mexican-American," and "black," defining a Mexican-American as a person with a Spanish surname (see 517 F.2d at 96 n.1). Since then, the parties and the courts below have generally used the terms "Anglo," "Mexican-American," and "black;" and we do the same. The DISD initially included Mexican-American students in the same ethnic category as Anglo students. The DISD first established a separate category for Mexican-American students in the 1968-1969 school year, at which time Mexican-Americans made up 7.7% of the total DISD student body (Answers to Plaintiffs' Interrogatories (First Set), App. Vol. 3, filed Nov. 18, 1970).

[4] The original desegregation suit went through numerous appeals before the stair-step plan was finally adopted. See *Brown* v. *Rippy*, 233 F.2d 796 (5th Cir.), cert. denied, 352 U.S. 878 (1956) (reversing the district court's order dismissing the suit as premature); *Borders* v. *Rippy*, 247 F.2d 268 (5th Cir. 1957); *Rippy* v. *Borders*, 250 F.2d 690 (5th Cir. 1957); *Boson* v. *Rippy*, 275 F.2d 850 (5th Cir. 1960)

285 F.2d 43. The stair-step plan obligated the DISD to eliminate the use of racial criteria in assigning students to its schools. The DISD was not required to implement any other measure to remove the vestiges of its prior dual system by techniques such as "pairing" or "majority-to-minority" transfers.

On June 23, 1965, the DISD board adopted a resolution providing for the phased desegregation of elementary, junior high, and high schools, and for the establishment of single attendance districts for each school (Deft. Ex. 1 (1971)). The superintendent was vested with discretion to carry out the resolution by establishing the boundaries of the attendance districts (*ibid.*). The result was the institution of a "neighborhood school" assignment policy in the DISD. On September 7, 1965, the DISD adopted a resolution to expedite implementation of the stair-step plan to include all twelve grades as of September 1, 1967 (Deft. Ex. 4 (1971)). The district court conducted no subsequent monitoring of the stair-step plan, nor did it ever declare the DISD to have achieved unitary status.

B. The institution of the present suit and the district court's first order

In 1970 a group of black and Mexican-American students and their parents instituted the present class

(holding that the district court had erred in failing to require the DISD to submit a desegregation plan). Even after the stair-step plan had been ordered, the court of appeals found it necessary to issue two additional orders requiring the district court to include the twelfth grade in the plan. *Britton* v. *Folsom*, 348 F.2d 158 (5th Cir. 1965), and *Britton* v. *Folsom*, 350 F.2d 1022 (5th Cir. 1965).

action in the United States District Court for the Northern District of Texas seeking to eliminate the remaining segregative effects of the prior dual system. Although the racial composition of the DISD's student body was approximately 59% Anglo, 33% black, and 8% Mexican-American when the complaint was filed, 67 of the 187 schools in the system had a student enrollment that was at least 90% Anglo; 40 of the schools had an enrollment that was 90% or more black; and in 9 additional schools the combined enrollment of black and Mexican-American students was more than 90% (Pltf. Ex. 5 (1971)). In 1970, 91.4% of all black students in the DISD attended schools where blacks or black and Mexican-Americans made up at least 90% of the student body, and only 2.72% of the black students attended schools where the student body was 57% or more Anglo (Pltf. Ex. 2 (1971)). Plaintiffs sought an injunction to desegregate the DISD meaningfully, assignment of faculty to reflect the overall racial composition of the district, termination of site acquisition and school construction that would increase or continue racial segregation in the district, and adoption of policies to lower the dropout rate among Mexican-American students.

The Board contended that no further court-ordered desegregation was warranted, since the Dallas schools were in compliance with the stair-step desegregation plan that the court of appeals had approved in 1960. The DISD claimed that the large number of one-race schools remaining in the district was the result of

changes in residential patterns since the institution of the stair-step plan.

On July 12, 1971, trial on the issue of liability began. Several parents testified that their children did not attend integrated schools, and that their children had not been assigned to the schools nearest their homes (I Tr. 19-20, 32 (1971); II Tr. 384 (1971)).[5] An employee who had drawn school attendance zone maps for the DISD testified that there were indeed a number of areas in the school district where students were not assigned to elementary, junior high, or high schools nearest their homes (I Tr. 64-70 (1971); Pltf. Exs. 7, 8, 11, 13, 15 and 16 (1971)). He used maps prepared from 1970 census data to illustrate the close correlation between zone lines for the DISD schools and racial population patterns (I Tr. 47-50, 59-60, 62-63 (1971)).

At the conclusion of the plaintiffs' case the DISD moved for summary judgment on the ground that "housing patterns * * * are the only things which resulted in any alleged all black school or all white school" (II Tr. 401 (1971)). The district court denied the motion, finding that the plaintiffs had made out a *prima facie* case (*ibid.*).

The DISD called two witnesses, School Superintendent Nolan Estes and William H. Fuller, Director of Pupil Accounting. On direct examination, Dr.

[5] The record includes five volumes of testimony from the 1971 proceedings, numbered I-V, and ten volumes of testimony from the 1976 proceedings, numbered I-X. We will refer to the year as well as the volume number in citing these transcripts.

Estes listed 19 schools that he believed had shifted from a predominantly Anglo student enrollment to a predominantly black student enrollment because of changes in residential patterns occurring after 1965 (II Tr. 514-520 (1971)). The DISD introduced no evidence on the reason for the racial imbalance in the 97 other schools in the DISD that had student enrollments either 90% or more Anglo, or 90% or more black and Mexican-American.

On cross-examination, Dr. Estes stated that there were sixteen schools built since 1965 in which Anglos made up more than 90% of the student body, or in which blacks or blacks and Mexican-Americans made up more than 90% of the student body (II Tr. 566-578 (1971)). Dr. Estes confirmed the fact that students in the DISD did not always attend schools nearest their homes, even where that would have promoted integration. He acknowledged that in 1970, Julia Frazier Elementary School, which had a 100% black enrollment, was so overcrowded that the use of ten portable classrooms was necessitated, while Ascher Silberstein Elementary School, which had a 97.8% Anglo enrollment, was only half-filled—even though Silberstein was actually closer than Frazier to some of the families in the Frazier zone (II Tr. 618-619 (1971)). Nonetheless, the DISD had not altered the attendance boundaries between Frazier and Silberstein (II Tr. 619-621 (1971)). He testified that capacity, distance, geographic barriers, traffic arteries, curriculum and projected enrollment had played a part in the DISD's drawing of attend-

ance zones, but that the racial composition of the student body was not considered (II Tr. 527, 590-591 (1971)).

On July 16, 1971, the district court issued an opinion[6] finding that "elements of a dual system still remain" in the DISD (342 F. Supp. at 947):

> When it appears as it clearly does from the evidence in this case that in the Dallas Independent School District 70 schools are 90% or more white (Anglo), 40 schools are 90% or more black, and 49 schools with 90% or more minority, 91% of black students in 90% or more of the minority schools, 3% of the black students attend schools in which the majority is white or Anglo, it would be less than honest for me to say or to hold that all vestiges of a dual system have been eliminated in the Dallas Independent School District, and I find and hold that elements of a dual system still remain.

The court rejected the Board's contention that the continued existence of one-race schools was the result of changes in residential patterns, reasoning that (*ibid.*):

> The School Board has asserted that some of the all black schools have come about as a result of changes in the neighborhood patterns but this fails to account for many others that remain as segregated schools.

Finally the district court rejected the Board's claim that it had completely fulfilled its constitutional obli-

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[6] The opinion, which is not reprinted in the appendices, is reported at 342 F. Supp. 945.

gations once it implemented the 1965 court-ordered stair-step plan. The district court pointed out (*id.* at 947-948) that the Board's arguments ignored this Court's ruling in *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), that a segregated school system must " 'come forward with a plan that promises realistically to work * * * *now* * * * until it is clear that state-imposed segregation has been completely removed' " (emphasis the Court's). Nor had the Board made any attempt to comply with the court of appeals' ruling in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969), that faculty and staff must be desegregated.[7]

[7] The DISD's policy of assigning faculty on a racial basis persisted throughout implementation of the stair-step plan, so that in 1971 black teachers were still assigned almost exclusively to black schools, and white teachers to white schools (Answer to Interrogatory 1(d), Answers to Plaintiffs' Interrogatories (First Set), filed Nov. 18, 1970). When the racial composition of the student body in a school changed, the faculty changed as well. For example, Holmes and Zumwalt Junior High Schools, and Pease and Stone Elementary Schools, which had all-white faculties in 1963-1964, opened with all-black faculties the very next year (*ibid.*). Although the record includes no statistics on the racial makeup of the schools in question during the 1963-1964 school year, by the 1966-1967 school year each of these schools had an all-black student body (Answers to Plaintiffs' Interrogatories (First Set), App. Vol. 4, filed Nov. 18, 1970).

The first indication that the DISD planned to abandon its segregated teacher assignment practices was Dr. Estes' testimony in 1971 that beginning in the 1971-1972 school year the *Singleton* guidelines would be implemented (II Tr. 414 (1971)).

The district court ordered the DISD to submit a desegregation plan, and after conducting further hearings on relief, it approved a plan with the following terms:[8] (1) elementary students would remain in their neighborhood schools but predominantly black and Mexican-American classrooms would be grouped with predominantly Anglo classrooms for closed circuit television classes and weekly visits; (2) secondary students would be assigned on a "satellite" zone basis and some secondary schools would be paired; (3) faculty desegregation would be carried out in accordance with the *Singleton* guidelines; (4) a majority-to-minority transfer program would be implemented for secondary students; (5) a tri-ethnic advisory committee would be established;[9] and (6) site selection and school construction would be carried out in a way calculated to "prevent the recurrence of a dual school structure." The district court subsequently stayed the student assignment provisions for secondary students on the grounds that the satelliting and pairing would be disruptive and would impose undue burdens on black students (342 F. Supp. at 953, 955-957).

[8] The remedial order, which is not reprinted in the appendices, is reported at 342 F. Supp. at 949-954.

[9] The district court also found that the plaintiffs had not proved *de jure* discrimination by the DISD against Mexican-Americans, but it concluded that Mexican-Americans are a sufficiently separate and identifiable ethnic group in the DISD to warrant their being taken into consideration in any desegregation plan. Accordingly, the court appointed a tri-ethnic advisory committee that included representatives of the Mexican-American community (*ibid.*).

C. The first appeal

The Board did not appeal the district court's finding that elements of its former dual school system remained, but the plaintiffs appealed from the district court's remedial order.[10] The court of appeals affirmed portions of the district court's order, but held that neither the "television plan" for elementary students nor the assignment plan for secondary students was adequate to eliminate the lingering vestiges of segregation in the Dallas schools.[11] Because the "television plan" would not have altered the racial characteristics of the DISD's elementary schools, the court of appeals concluded it could not be accepted as "a legitimate technique for the conversion of the DISD from a dual to a unitary educational system * * * without a "white" school and a "Negro" school, but just schools' " (517 F.2d at 103, quoting *Green* v. *County School Board, supra*, 391 U.S. at 442). With

[10] In two consolidated appeals the plaintiffs also sought reversal of the district court's refusal to enjoin various school construction and renovation projects.

[11] The court of appeals' opinion, which is not included in the appendices, is reported at 517 F.2d 92. The court of appeals affirmed the district court's decision to treat Mexican-Americans as a separate ethnic minority for purposes of developing a desegregation plan, and that portion of the lower court's rulings is not challenged here. The court of appeals also approved the district court's creation of a tri-ethnic advisory committee, and it declined, at that time, to disturb the district court plan for the desegregation of the faculty and staff of the DISD. Finally, the court of appeals affirmed the district court's refusal to order interdistrict busing, as well as its refusal to exclude from its remedial order recently developed areas of the DISD.

respect to secondary schools, the court of appeals found that the plan's "extremely limited objective" of reducing the proportionate share of a single racial group's enrollment at a particular school to just below the 90% mark "is short of the Supreme Court's standard of conversion from a dual to a unitary system" (517 F.2d at 104). Finally, the court of appeals concluded that the Board had erred in planning its site selection and construction on the basis of the attendance zones established by the district court's remedial orders, which it found (*id.* at 106)—

> * * * were, for the most part, the same zones which had been employed by the DISD over previous academic years to implement its "neighborhood school concept." As the district court found in this case, the "neighborhood school concept" has resulted in the perpetuation of the vestiges of the dual school system in the DISD.

The court of appeals remanded the case to the district court for the formulation of a new plan, directing the district court to use and adapt "the techniques discussed in *Swann* [v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)]" (517 F.2d at 110) to dismantle the dual structure of the Dallas school system by the middle of the 1975-1976 school year.

This Court denied the Board's petition for a writ of certiorari. *Estes* v. *Tasby*, 423 U.S. 939 (1975).

D. The proceedings on remand in the district court

1. *The plans submitted to the district court*

On remand the district court conducted hearings in late 1975 and early 1976. The participants in these hearings were the parties and several groups of intervenors, including local branches of the N.A.A.C.P. The Curry intervenors, petitioners in No. 78-282, represented a group of residents in the northern section of the DISD, and the Brinegar intervenors, petitioners in No. 78-283, represented a group of parents and students from the residentially integrated East Dallas section of the DISD.

Six plans were considered by the district court and described in some detail in its opinion (Pet. App. 18a-29a). The DISD and N.A.A.C.P. plaintiff-intervenors each filed desegregation plans, and the district court appointed its own expert, Dr. Josiah C. Hall, to prepare an additional student assignment plan. Plaintiffs filed alternative plans A and B, and the sixth plan was submitted by the Educational Task Force of the Dallas Alliance, a community service organization that was granted *amicus curiae* status for the purpose of submitting its proposal (Pet. App. 6a).[12] The student assignment provisions of each plan were as follows.

The DISD's proposal used pairing and clustering to desegregate grades 4 through 12 in 72 schools in

[12] The court also received plans and suggestions from various other groups, including a proposal from a group of students at Skyline High School (Pet. App. 7a n.4).

predominantly Anglo parts of the district; it left undisturbed 48 one-race schools serving predominantly minority areas and 55 schools serving naturally integrated areas (Pet. App. 18a-19a & n.17). Under the DISD's proposal about 67% of the DISD's black students would have attended schools where the minority enrollment exceeded 90% (Deft. Ex. 11 (1976)).[13]

The plaintiffs' Plan A divided the DISD into seven elementary subdistricts, with each school reflecting the racial composition of its subdistrict (Pet. App. 21a). Naturally integrated subdistricts retained their prior assignment patterns and all other schools were paired or clustered (*ibid.*). This plan left fewer than 1% of the black students in schools where minority enrollment exceeded 90% (Pltf. Ex. 16 (1976)). Plaintiffs' alternative Plan B divided the DISD into eight subdistricts, one of which—South Oak Cliff—remained predominantly minority, continuing its existing student assignment patterns but with enhanced facilities and programs aimed at attracting students from the other seven subdistricts (Pet. App. 22a & n.32). In the other seven subdistricts, pairing and clustering were used to achieve desegregation, except where residential integration made such tools unnecessary (*ibid.*). Plan B left about 23% of the DISD's black students in schools

[13] All of the proposed plans also advocated the use of "magnet" schools, which are schools with special curriculums or programs designed to attract students from throughout the school district.

where minority enrollment exceeded 90% (Pltf. Ex. 16 (1976)).

The plan proposed by the N.A.A.C.P. plaintiff-intervenors sought to achieve racial balance in every school to reflect the proportions in the DISD student population as a whole using pairing and clustering, except in naturally integrated areas, and eliminating one-race schools entirely (Pet. App. 23a).

Dr. Josiah Hall, the court's expert, presented a plan continuing existing attendance zones in naturally integrated areas, and pairing and clustering schools in predominantly Anglo areas with schools in predominantly black and Mexican-American areas (Pet. App. 24a). Students in kindergarten and first grade were to attend schools nearest their homes, and existing attendance zones were retained for other grades if transportation time to another school exceeded thirty minutes each way (Pet. App. 24a-25a & n.40). Under the Hall plan, 44% of the black students would have attended schools in which the black enrollment exceeded 90% (Hall Ex. 5 (1976)).

The plan submitted by the Educational Task Force of the Dallas Alliance divided the DISD into five subdistricts (Pet. App. 26a). All the subdistricts but one—South Oak Cliff—reflected the racial proportions of the DISD as a whole (*ibid.*). Students in grades K through 3 were to attend the nearest school that would promote integration, with the distance not to exceed four miles from their homes (*ibid.*). In grades 4 through 8, students living in naturally integrated areas remained in their existing attendance zones and students in other areas were assigned to schools in

the subdistrict that would reflect the racial proportions of the subdistrict (Pet. App. 27a). The attendance zones for students in grades 9 through 12 were not altered, but students were to be given the option of attending magnet schools or participating in a majority-to-minority transfer program (Pet. App. 27a-28a).

2. *The district court's desegregation order*

After conducting hearings on the various desegregation proposals, the district court filed an opinion and order requiring implementation of a revised version of the Dallas Alliance Task Force plan (Pet. App. 4a-41a, 46a-120a).[14] The district court's plan divided the DISD into six subdistricts (Pet. App. 53a). Four of these subdistricts had approximately the same racial make-up as the system as a whole; the remaining two subdistricts—Seagoville and East Oak Cliff—had an 82% Anglo student population and 98% black student population respectively (Pet. App. 53a, 135a). Within the subdistricts elementary stu-

[14] On March 10, 1976, the district court entered an opinion and order generally approving the concepts of the plan submitted by the Dallas Alliance Task Force (Pet. App. 29a-41a). The court subsequently entered a supplemental opinion and final order (Pet. App. 46a-120a) setting forth the details of the Task Force plan as modified. The actual plan submitted by the Dallas Alliance contained no projected enrollment figures by which the district court could compare its desegregative impact with those of the other proposed plans. Projected enrollments were only supplied later when the DISD submitted its proposal for implementing the Dallas Alliance plan.

dents in grades K through 3 were to remain in their neighborhood schools (Pet. App. 57a). In areas that were not naturally integrated, students in grades 4 through 8 were assigned to centrally located intermediate and middle schools in the subdistrict (*ibid.*). In naturally integrated areas, prior attendance patterns were continued for grades 4 through 8 (Pet. App. 57a, 136a). High school students were to remain in their neighborhood schools unless they chose to attend magnet schools or to participate in a transfer program (Pet. App. 58a). Majority-to-minority transfers were permitted at all grade levels (Pet. App. 68a-71a), and the magnet school concept was expanded at the high school level and extended to create "academies" and "vanguard schools" with special programs at the middle and intermediate school level (Pet. App. 61a-63a).[15]

The student assignment provisions approved by the district court maintained approximately 66 schools in the DISD in which either the Anglo, the black, or the combined black and Mexican-American enrollments exceeded 90% (Pet. App. 132a-133a & n.3). The plan provided that all the schools serving the East Oak Cliff subdistrict—which enrolled 27,500 students, including 41% of the black students in the DISD—would have student bodies more than 90%

[15] The plan approved by the district court also includes a number of provisions regarding accountability, personnel, and other matters that are not at issue here (Pet. App. 67a-68a, 73a-83a).

black, or more than 90% black and Mexican-American (Pet. App. 113a-118a, 132a-133a n.3).[16]

Approximately 50 one-race schools[17] remained in subdistricts other than East Oak Cliff, including high schools in three of the five other subdistricts (Pet. App. 133a). In the Southeast subdistrict, Lincoln High School had a 100% black enrollment, while the enrollment at Samuell High School was 89% Anglo (Pet. App. 104a). In the Northeast subdistrict, Bryan Adams High School was 95.2% Anglo, while James Madison High School had 98.1% black students and 1.7% Mexican-Americans (Pet. App. 97a). In the Northwest subdistrict, both Hillcrest High School and White High School were 96% Anglo, whereas Pinkston High School had a combined black

[16] Appendix A to the district court's opinion erroneously listed James Bowie elementary school, which had 29.7% Anglo students, in the East Oak Cliff subdistrict (Pet. App. 114a), but that error was corrected in the district court's supplemental opinion, which indicated that Bowie was in the Southwest district (Pet. App. 125a).

The earliest enrollment statistics by race in the record, those for the 1966-1967 school year (before full implementation of the stair-step plan), reveal that eight of the schools serving East Oak Cliff were already more than 90% black in enrollment that year (Answers to Plaintiffs' Interrogatories (First Set), App. Vol. 4, filed Nov. 18, 1970).

[17] The court of appeals used the term "one race" to describe a school where either the Anglo enrollment or the combined black and Mexican-American enrollment exceeded 90% (Pet. App. 132a n.3), and we do the same.

and Mexican-American enrollment of 95.1% (Pet. App. 90a).[18]

The remaining one-race schools are found primarily among the elementary schools serving grades K through 3. This group includes 21 schools outside East Oak Cliff which had either Anglo, black, or combined black and Mexican-American enrollments of more than 90% in 1966-1967, the first year for

[18] In 1966-1967 Hillcrest, Adams and Samuell were 100% white schools, and White had only one black student (Answers to Plaintiffs' Interrogatories (First Set), App. Vol. 4, filed Nov. 18, 1970). That same year Lincoln and Madison had 100% black enrollments (*ibid.*). Thus, of the seven one-race high schools remaining outside East Oak Cliff under the district court's order, six were one-race schools the year before full implementation of the stair-step plan in 1968.

The racial separation in these schools has decreased slightly as a consequence of the voluntary integration accomplished by students exercising majority to-minority transfer options. The April 15, 1979 report of the DISD to the district court contains the following figures:

Lincoln	Samuell	Bryan Adams
.18% Anglo	74.53% Anglo	86.26% Anglo
99.82% Black	18.19% Black	4.86% Black
	6.79% Mexican-American	6.82% Mexican-American

James Madison	Hillcrest
.30% Anglo	78.14% Anglo
98.81% Black	18.15% Black
.75% Mexican-American	1.81% Mexican-American

W. T. White	Pinkston
90.38% Anglo	1.06% Anglo
4.39% Black	82.08% Black
3.61% Mexican-American	16.45% Mexican-American

which the DISD has provided racial statistics.[19] Although the district court's assignment plan employs grade configurations of K-3, 4-6, and 7-8, most of the DISD elementary schools include grades K through 6 (Pet. App. 136a n.9), so that in a single elementary school children in grades K-3 would be in one-race classes, but those in grades 4-6 would be in integrated classes. Looking only at grades K-3, there are 53 schools in the DISD in which the Anglo or combined black and Mexican-American enrollments for those grades exceed 90%.[20]

Although the district court's plan did have some integrative effect on students in grades 4 through 8, it did not result in any overall desegregation of black students. Prior to implementation of the plan, approximately 59.19% of the black students and 16.41% of the Anglo students in the DISD attended one-race schools.[21] As of the 1978-1979 school year, the third year under the district court's plan, the percentage of Anglo students enrolled in one-race schools had

[19] The schools are Arlington Park, Brown, Cabell, Carr, Carver, Colonial, Darrell, Dunbar, Frazier, Gooch, Harris, Hassell, Hexter, Kramer, Lagow, Moseley, Ray, Rice, Thompson, Tyler, and Wheatley (Answers to Plaintiffs' Interrogatories (First Set), App. Vol. 4, filed Nov. 18, 1970).

[20] These figures are derived from the April 15, 1979 report of the DISD to the district court.

[21] This figure is derived from the DISD's report to the district court on December 1, 1975. Data from that report are contained in the DISD's Answers to Interrogatories of Strom Intervenors, filed with the district court on December 5, 1975.

declined to 8%, but 59% of the black students in the district were still enrolled in one-race schools.[22]

E. The second appeal

Both the plaintiffs and the N.A.A.C.P. plaintiff-intervenors appealed from the district court's remedial order, contending that the student assignment provisions were inadequate to eliminate the continuing effects of the DISD's past segregation. On April 21, 1978, the court of appeals, in the order challenged here, remanded the case for formulation of a new student assignment plan including findings that would "justify the maintenance of any one-race schools that may be a part of that plan" (Pet. App. 145a).

The court of appeals did not hold that a remedial plan for Dallas must eliminate all one-race schools; it held only that the district court must make findings regarding the reasons, if any, why one-race schools could not be eliminated by application of the various techniques previously approved by this Court (Pet. App. 137a-138a):

> The district court was instructed in the opinion of the prior panel to consider the techniques for desegregation approved by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971). We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of these techniques. *Davis* v. *East Baton Rouge Parish School Board*, No. 75-3610 (5th Cir. April 7, 1978). There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing. See *Mims* v. *Duval County School Board*, 329 F. Supp. 123, 133-134 (M.D. Fla. 1971).

[22] These figures are derived from the April 15, 1979 report of the DISD to the district court.

Focusing on the problem presented by the continued existence of one-race high schools, the court of appeals stated (Pet. App. 138a; footnotes omitted):

> Although students in the 4-8 grade configurations are transported within each subdistrict to centrally located schools to effect desegregation, the district court's order leaves high school students in the neighborhood schools. Within three of the four integrated subdistricts, this results in high schools that are still one-race schools. The district court is again directed to evaluate the feasibility of adopting the *Swann* desegregation tools for these schools and to reevaluate the effectiveness of the magnet school concept. If the district court determines that the utilization of pairing, clustering or the other desegregation tools is not practicable in the DISD, then the district court must make specific findings to that effect.

The court of appeals also considered several other aspects of the district court's remedial order that are

not at issue here. It held the district court had erred in not requiring the Board to provide transportation for students who choose to participate in the majority-to-minority transfer plan (Pet. App. 138a-139a). The appellate court affirmed the district court's refusal to include the separate Highland Park school system in the student assignment plan (Pet. App. 141a).[23] And, in a related appeal, the court rejected the claims of a group of citizens who opposed a DISD plan to convert a shopping center in East Oak Cliff into a school complex (Pet. App. 141a-145a).

On May 22, 1978, the court of appeals denied the DISD's petition for rehearing (Pet. App. 146a-147a).

SUMMARY OF ARGUMENT

I

As required by the Texas Constitution, the DISD operated separate schools for black students and white students both before and after *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In 1965-1967 the DISD, for the first time, implemented a federal

[23] The plaintiffs had sought unsuccessfully in the district court to include various independent school districts in the desegregation plan. All of these except the Highland Park Independent School District were dismissed on the plaintiffs' motion. Highland Park serves two virtually all-white communities surrounded by the DISD. The district court had concluded that for the past twenty years the Highland Park school district had not engaged in segregation and that its prior policy of discrimination had but a negligible effect on the DISD, and on this basis the court refused to include Highland Park in the student assignment plan for the DISD. The court of appeals affirmed (Pet. App. 141a).

court order requiring the elimination of segregatory assignments by race, but it took no other steps to dismantle its dual system, and the enrollment figures at the time of trial in 1971 revealed the continuation of the racial separation so long mandated by law. Almost all of the schools that were all-black at the time of the first court-ordered desegregation remained virtually all-black. More than 90% of the black students in the DISD continued to attend schools where more than 90% of the students were black. Moreover, by the time of trial the DISD had not desegregated its faculty.

The district court correctly recognized that the high degree of racial separation still found throughout the system was a vestige of the dual system that had not been dismantled.

The DISD had an affirmative duty to dismantle the dual system and eliminate its vestiges. Its obligation was to remedy the continuing effects of its longstanding segregation. This duty was not satisfied when the DISD—under court order—eliminated racial criteria for admission in 1965, which was only the first step in dismantling the dual system. The DISD had a duty to adopt a plan that would be effective to desegregate its school system. It had not done so at the time of trial.

II

Since the DISD had not dismantled its dual system, the district court's responsibility was to fashion a remedy to convert to a unitary system and eliminate the vestiges of the prior dual system root and

branch. The task of its remedial decree was to achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1972).

The district court's remedial order left intact major elements of the prior dual system: 66 one-race schools, many of which were operating as one-race schools before the first court-ordered desegregation. The court of appeals properly remanded the case for reconsideration of the remedial order because the record did not establish that the order achieved the greatest degree of desegregation that was practical.

The court of appeals correctly recognized that in a district, like the DISD, with a long history of segregation, there is a presumption against the continued existence of so many one-race schools, and that the DISD had the burden of showing that racial composition of the schools was not the result of its own past segregative actions. Since the DISD failed to carry the burden of showing that its past segregative acts had not affected the remaining one-race schools, the court of appeals correctly remanded the case for reconsideration and further findings to permit the district court accurately to determine the greatest degree of desegregation that would be practical.

The district court stated that desegregation of the all-black East Oak Cliff subsection would be impractical, but the record did not include studies showing that the times and distances for the necessary student transportation (proposed in several plans before the

district court) were too great to be practical. The court of appeals properly remanded the case for specific findings why tools such as pairing and clustering of schools could not be used to desegregate part or all of East Oak Cliff, which contained more than 27,000 black students.

The district Court also stated that desegregation of the high schools would not be practical—even though it ordered desegregation of the smaller junior high schools. Again the court of appeals properly remanded the case for specific findings why the high schools could not, with practicality, be desegregated as well.

The district court concluded that students in grades K through 3 were not mature enough to be assigned anywhere but their neighborhood schools. The district court did not consider whether desegregation of some or all of the one-race elementary schools could be achieved if transportation time were carefully limited because of the students' age. Again, the court of appeals properly remanded the case for more specific findings regarding the feasibility of greater desegregation.

The court of appeals did not err in remanding the case for reconsideration of plans involving more student transportation. The district court's limited use of pairing, clustering, and student transportation—together with its heavy reliance on magnet schools—had not been effective to achieve the desegregation of the DISD's former dual system. Accordingly, the court of appeals properly directed the district court

to consider the feasibility of making greater use of techniques that promised to be effective to dismantle the dual system.

ARGUMENT

I

A SYSTEMWIDE REMEDY IS APPROPRIATE BECAUSE THE BOARD HAS NOT FULFILLED ITS CONTINUING OBLIGATION TO ELIMINATE THE VESTIGES OF THE FORMER DUAL SCHOOL SYSTEM THAT PERSIST THROUGHOUT THE DISTRICT

A. Vestiges of the DISD's dual school system remain throughout the district

Until its repeal on August 5, 1969, Article 7, § 7 of the Texas Constitution required racial segregation in the public schools throughout the State, and Dallas operated a constitutionally and statutorily mandated dual school system both before and after *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*).[24]

Although a court-ordered stair-step desegregation plan eliminated separate racial assignment zones for all grades by 1967, new attendance zones were drawn without any effort to encourage integration, and in most cases the schools attended by black students before the implementation of the stair-step order remained all-black.[25] Enrollment figures for the 1966-

[24] Many state statutes effectuating Article 7 § 7 are set forth in Respondents' Br. at 11-12 n.4.

[25] Although there are no school-by-school enrollment figures by race for years prior to 1966-1967, it is possible to identify many schools attended by blacks in earlier years because the faculties were segregated as well and the record includes the all-black faculties in the early 1960's (Answer to Interrogatory 1(d), Answers to Plaintiffs' Interrogatories (First Set), filed Nov. 18, 1970). There were 37 schools that had all-black faculties before 1965. The 1966-1967 enrollment figures for these 37 schools reveal that 29 continued to have black enrollments exceeding 90%, three had closed (Attucks, Eagle Ford, and Starks), and five others had changed to less than 90% black enrollment (Sequoyah, Pinkston, Douglass, Roberts, and Miller). The extent to which the change in these five schools is attributable to enrollment of Mexican-American, rather than Anglo, students is not reflected in the record (see note 26, *infra*).

1967 school year reveal that the student bodies in 101 of the DISD's 171 schools were either 100% black or 100% Anglo.[26]

At the time of trial in 1971, this high degree of racial separation persisted. The schools that blacks had attended before 1965 remained virtually all-black. More than 90% of the black students in the DISD attended schools where less than 10% of the students were Anglo, and 63% of the black students attended schools where less than 1% of the students were Anglo (Answers to Plaintiffs' Interrogatories (First Set), App. Vol. 1, filed Nov. 18, 1970). More than two-thirds of the Anglo students attended schools where Anglos made up 90% or more of the student body (*ibid.*). And the Board had made no provision for majority-to-minority transfers (see II Tr. 560-563, 645-647 (1971)).

After conducting a full hearing on the current conditions in the DISD, the district court concluded that the extreme racial separation throughout the

[26] As previously noted (page 4, *supra*, note 3), until the 1967-1968 school year the DISD counted Mexican-American students as white.

DISD was the legacy of the prior dual system that had never been effectively dismantled. The basis for that conclusion was the court's finding (page 9, *supra*) that 119 schools in the DISD were either 90% or more Anglo or 90% or more black and Mexican-American in their enrollments and that 91% of the black students attended predominantly minority schools, while only 3% of the black students attended majority Anglo schools.[27]

The DISD's faculty assignments also evidenced the continuing effects of the DISD's prior dual system. No effort was made to desegregate the faculty of the DISD during the years the court-ordered stair-step plan was being implemented. Although Superintendent Estes testified that a phased faculty desegregation program affecting 20 schools was adopted in 1968 (II Tr. 455 (1971)), by the time of trial in 1971, 88.8% of the black teachers in the DISD were still assigned to schools where the student body was at least 90% black, and less than 5% of the

[27] Petitioners and respondents engage in a heated debate over the question whether the district court found that the DISD was operating a dual system, or merely that there were still vestiges of the prior dual system. The district court did not focus on this distinction and its 1971 liability finding refers to vestiges, whereas its April 7, 1976 supplemental opinion assumes that in 1971 the court found the DISD was operating a dual system (412 F. Supp. 1211).

In our view, the narrow distinction petitioners seek to draw between the vestiges of a dual system and the dual system itself is meaningless where, as here, school officials have taken no action to alter the racial characteristics of the schools that were once segregated and what remained is a system where more than 90% of the black students remain in all-black schools.

black teachers were assigned to schools where 90% or more of the students were Anglo (Plaintiffs' Exhibit 4 (1971)). Only after trial of this case began did the DISD announce a plan to desegregate all its faculty in accordance with the Fifth Circuit's 1969 decision in *Singleton*. As this Court pointed out in *Dayton Board of Education* v. *Brinkman*, No. 78-627 (July 2, 1979), slip op. 11-12 (*Dayton II*), such continuing faculty segregation is "strong evidence that the Board was continuing its efforts to segregate students." See also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).

The district court correctly rejected the DISD's claim that the racial separation in the schools was not attributable to the lingering effect of state-imposed segregation, but to changes in residential patterns since the institution of the stair-step plan in 1965. Once the plaintiffs have established, as they did here, that the school board's intentional past acts created a dual school system, it becomes the burden of the school authorities to show that the current segregation "is not the result of present or past discriminatory action on their part." *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 26. Where, as here, the record establishes that there has been a dual system, "the systemwide nature of the violation funishe[s] prima facie proof that current segregation in the * * * schools was caused at least in part by prior intentionally segregative official acts." *Dayton II*, *supra*, slip op. 9.

The evidence introduced by the DISD did not carry this burden. Superintendent Estes testified that be-

tween 1965 and 1970—during and after implementation of the stair-step plan—he believed approximately 19 schools in the district had changed from majority Anglo to majority black and Mexican-American because of changes in residential patterns (II Tr. 514-520 (1971)). As the district court observed, this evidence fell far short of demonstrating that the Board's prior segregative acts had not caused the conditions of racial separation that were still so evident throughout the district, since Estes' testimony accounted for only a fraction of the one-race schools, providing no explanation for the existence of 97 other one-race schools throughout the DISD in 1970-1971, most of which had the same racial composition before and after implementation of the stair-step plan. Moreover, even assuming that changes in residential patterns did influence the racial composition of the 19 schools Estes identified, school segregation—which often contributes to housing segregation—may nevertheless have played an important part in determining the racial composition of the schools. See *Columbus Board of Education* v. *Penick*, No. 78-610 (July 2, 1979), slip op. 14-15 n.13.

B. The DISD was under a continuing obligation to eliminate these vestiges

1. As this Court reaffirmed most recently last Term in *Columbus Board of Education* v. *Penick*, *supra*, slip op. 8 (citations omitted), a school system, like the DISD, that has operated dual schools is—

> "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." * * * Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.

The DISD's "continuing 'affirmative duty to disestablish the dual school system' is therefore beyond question." *Columbus Board of Education* v. *Penick*, *supra*, slip op. 10, quoting *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971).

2. Relying on *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), the Brinegar petitioners contend that the district court erred in focusing on the question whether the one-race schools throughout the district were vestiges of the prior dual system, rather than the question whether the current racial separation in the schools had been caused by the Board's intentionally segregative actions.[28] But as this Court's opinion in *Dayton II* makes clear, the DISD had an affirmative duty

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[28] The record before the Court in *Dayton I* showed only isolated instances of segregative acts in a system where "mandatory segregation by law * * * ha[d] long since ceased." 433 U.S. at 420. As this Court observed in *Columbus Board of Education* v. *Penick*, *supra*, slip op. 7 n.7, *Dayton I* held that record was "insufficient to give rise to an inference of systemwide institutional purpose and * * * did not add up to a facially substantial systemwide impact."

Here, in contrast to the record in *Dayton I*, statutory segregation ceased when the stair-step plan was fully implemented in 1967, less than four years before the district court's liability finding, and almost all of the schools that had been black schools in 1966-1967 were still more than 90% black.

to desegregate, a duty that required it "to do more than abandon its prior discriminatory purpose" (slip op. 11), and the lower courts were "quite justified in utilizing the Board's total failure to fulfill its affirmative duty * * * to trace the current, systemwide segregation back to the purposefully dual system of the 1950's and to the subsequent acts of intentional discrimination" (slip op. 14). *Dayton II* holds "the measure of the post-*Brown* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system" (slip op. 10-11). In the instant case, petitioners concede that the DISD deliberately maintained separate schools for black and white children in Dallas until the mid-1960's. So long as the effects of that intentional conduct remain unremedied, no additional finding of intent is necessary before the court may act to remedy the DISD's perpetuation or aggravation of those effects.[29]

[29] The Brinegar petitioners also rely heavily on this Court's statement in *Washington* v. *Davis*, 426 U.S. 229, 240-248 (1976), that evidence of a racially discriminatory purpose is necessary to prove a violation of the Equal Protection Clause. *Davis* is fully consistent with *Dayton II*. The Brinegar petitioners overlook the portion of the *Davis* opinion stating that where there is an unremedied purposeful violation of equal protection, subsequent related conduct would be unconstitutional if it has an impact which perpetuates the past discrimination or if it was performed with a discriminatory purpose. Citing *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972), the *Davis* opinion explained, 426 U.S. at 243, that no independent showing of invidious intent underlying the school district's decision to divide and form a new district was necessary in *Wright*, where the effect of that action was to undermine a court-ordered plan to remedy purposeful discrimination previously found in the Emporia public schools. The same general principle was reaffirmed in *Dayton II*.

3. The Board's affirmative duty was not, as the Curry petitioners contend (Curry Br. 17-21), satisfied by the implementation of the court-ordered stair-step plan. The Fifth Circuit pointed out in its opinion on the first appeal that the stair-step plan was a limited remedy that replaced overtly racial student assignments with a "neighborhood school" policy, but was not designed to eliminate all vestiges of state-imposed segregation (*Tasby* v. *Estes*, *supra*, 517 F.2d at 95):

> The "stair-step" desegregation process we directed in 1960 and implemented by the DISD the following year merely involved the elimination of racial criteria for the admission of students to the DISD's schools. The DISD was not directed to take affirmative action to remove the vestiges of its formerly statutorily-required dual education system through such techniques as "freedom-of-choice", "pairing", or "majority-to-minority transfer program." In fact the DISD took no further steps to eliminate the traces of segregation than required to do by the terms of our 1965 desegregation order.

As this Court stated in *Green* v. *County School Board*, *supra*, 391 U.S. at 437, "[i]n the context of the state-imposed segregated pattern of long standing," the fact that a school board has "opened the doors of the

former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system."

The circumstances of this case are much like those of *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.* As this Court recently noted in *Columbus Board of Education* v. *Penick, supra,* slip op. 9, "an initial [de]segregation plan had been entered [in *Swann*] in 1965 and had been affirmed on appeal. But the case was reopened, and in 1969 the school board was required to come forth with a more effective plan." In *Swann,* as here, the earlier remedial order did not fulfill the Board's obligation because it "fell short of achieving [a] unitary school system." 402 U.S. at 7. Although the racially neutral geographic zoning plan had been in force for several years, two-thirds of all black students were still attending schools where 99% or more of the student body was black (*ibid.*).[30] Accordingly, it was necessary to implement a more effective desegregation plan.

As we have shown, *supra* at pages 28-31, the DISD's racially neutral zoning plan was equally ineffective in eliminating the effects of the prior system of segregation, and accordingly the DISD's duty had not been satisfied.[31]

4. The Curry petitioners also contend (Curry Br. 30) that the far North Dallas area where they reside was settled after *Brown I,* and that the district court erred in including North Dallas in its remedial plan because the racial composition of the schools in that area was solely the result of predominantly white residential settlement, not the DISD's segregative actions.[32]

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[30] Similarly, in *Green* v. *County School Board, supra,* 391 U.S. at 441, the Court found the school board's adoption of a freedom of choice student enrollment plan had not satisfied its obligations when after three years of operation, 85% of the black students were still in a one-race school.

[31] This is clearly not a case like *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424 (1976), where the district court had implemented a comprehensive scheme that effectively desegregated the student bodies of every school throughout the district, and then ordered the school board to take further action to realign attendance boundaries from year to year in order to maintain a permanent racial balance throughout the district. *Pasadena* follows up on the Court's cautionary comment in *Swann* that " '[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.' " 427 U.S. at 436, quoting *Swann, supra,* 402 U.S. at 31-32. But here, as in *Swann* itself, a second remedial order is necessary where an apparently neutral assignment plan has been insufficient to counteract the continuing effects of past school segregation. 402 U.S. at 28. See also *University of California Regents* v. *Bakke,* 438 U.S. 265, 300-302 (1978) (opinion of Powell, J.), 353-355 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 159-161 (1977) (opinion of White, J.); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425, 435 (1975).

[32] The court of appeals rejected a similar claim by the Curry petitioners on the first appeal (*Tasby* v. *Estes, supra,* 517 F.2d at 108).

The record does not support this claim. It establishes that all but one of the eight schools in the far North Dallas area were established as one-race schools before full implementation of the stair-step plan that was the first step toward eliminating the dual system in the DISD.[33] All but one of these schools opened with all-white faculties between 1958 and 1965,[34] and all but one had more than 90% white enrollment during the 1966-1967 school year, the first year for which enrollment data by race are available.[35] The remaining school, Nathan Adams, opened in the 1967-1968 school year with a more than 90% white enrollment and an all-white faculty.[36] Since the far North Dallas schools were thus part of the dual system operated by the DISD, the district court did not err in including those schools in its remedial order.[37]

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[33] The schools are Nathan Adams, Cabell, Degolyer, Gooch, Marcus, Withers, and Marsh Junior High Schools, and W. T. White High School.

[34] Answer to Interrogatory 1(d), Answers to Plaintiffs' Interrogatories (First Set) App. Vol. 4, filed Nov. 18, 1970.

[35] Answers to Plaintiffs' Interrogatories (First Set) App. Vol. 4, filed Nov. 18, 1970.

[36] *Ibid.*

[37] There is no merit to the Curry petitioners' contention (Curry Br. 30) that the district court made a finding that their schools were not affected by the DISD's segregative acts. The following passage, on which the Curry petitioners base their argument, is simply a general statement about the difficulty of constructing a remedial order; the district court was discussing the question of remedy rather than violation and was not referring specifically to North Dallas or to any particular section of the city (342 F. Supp. at 951):

> The adoption of a plan of desegregation for a school system of the size and complexity of DISD has been commented upon briefly. The problems result, of course, from private housing patterns that have come into existence and not from any action of the DISD.

II

THE COURT OF APPEALS PROPERLY REMANDED THE CASE FOR CONSIDERATION OF THE FEASIBILITY OF DESEGREGATING THE REMAINING ONE-RACE SCHOOLS

In a school desegregation case, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 16. See *Dayton I, supra*, 433 U.S. at 420. Where, as here, the condition that violates the Constitution is the creation of a dual system, with separate schools for black and white students, the appropriate remedy is conversion to a unitary system where there are no longer black schools or white schools, but "just schools." *Green* v. *County School Board, supra*, 391 U.S. at 442. In effecting that conversion, the goal is "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971). The obligation imposed by the Constitution, however, "does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann* v. *Charlottee-Mecklenburg Board of Education, supra*, 402 U.S. at 24.

The court of appeals faithfully applied these principles in reviewing the district court's remedial or-

der. It remanded for further consideration of the student assignment provisions—which left intact major elements of the prior dual system—because the record did not establish that those provisions would accomplish the maximum desegregation practical in the circumstances.[38]

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[38] Despite petitioners' criticisms of the court of appeals (see Brinegar Br. 28), it is clear that that court did not order the district court to eliminate all one-race schools, and did not exceed the proper bounds of appellate review. The court of appeals expressly recognized the possibility that the district court's revised student assignment plan might include some one-race schools, and accordingly it remanded not only "for the formulation of a new student assignment plan," but also "for findings to justify the maintenance of any one-race schools that may be a part of that plan" (Pet. App. 145a). By remanding to the district court for further findings and reformulation of the student assignment plan, the court of appeals scrupulously adhered to the proper role of an appellate court. It attempted to review the district court's findings in support of its remedial order, and, upon determining that the district court's generalized findings were insufficient, it remanded the case for further findings and reformulation of the plan instead of instituting its own more sweeping remedy. Cf. *Dayton I*, *supra*, 433 U.S. at 417-418.

Petitioners also criticize the length, delay, and uncertainty that often characterizes school desegregation litigation. But these problems do not stem from the courts. The cases where there have been excessively long delays have generally involved school districts that have operated dual systems for decades and that have been grudging—if not recalcitrant—in converting to a unitary system. In this case, for example, six appeals were required before the school district implemented the stair-step plan and ceased using racial criteria to make student assignments. See *supra* pages 4-5, note 4.

The district court's order left intact 66 one-race schools, most of which were operating as one-race schools in 1965 before the DISD began to implement the first court-ordered desegregation of its statutory dual system. The court's plan divided the DISD into six subdistricts, one of which—East Oak Cliff—"is nearly all black and contains only one-race schools" (Pet. App. 132a). The plan provided that except for those who elect to exercise the option of majority-to-minority transfers, all of the more than 27,500 students in the subdistrict would continue to attend the all-black schools located within the subdistrict. Outside of East Oak Cliff, the district court's plan left 50 one-race high schools and elementary schools for grades K through 3; only in grades 4 through 8 was nearly complete desegregation achieved by the use of techniques such as pairing and clustering. Despite the integration of grades 4 through 8, the majority of black students in the DISD—59%—remained isolated in one-race schools both before and after implementation of the district court's plan.

The court of appeals correctly recognized (Pet. App. 137a) that the continued existence of so many one-race schools required special scrutiny of the district court's plan, and that such schools could be maintained only to the extent that the practicalities of the situation prevent their desegregation. As this Court explained in *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 26, the existence of one-race schools "is not in and of itself the mark of a system that still practices segregation

by law," but in a system, like the DISD, where there has been a long history of segregation, there is "a presumption against schools that are substantially disproportionate in their racial composition":

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action.

The court of appeals properly remanded the case because the record before it was insufficient to establish that the 66 one-race schools left intact under the district court's plan had not resulted from the DISD's past and present segregative acts, or that the desegregation of some or all of the schools was impractical.[39]

[39] Petitioners attack the remedial principles of the *Swann* decision. But in view of this Court's reaffirmance of those principles in *Columbus Board of Education* v. *Penick, supra,* slip op. 8-9, we will not offer an elaborate defense of that decision. We note, however, that the principles of *Swann* and its companion case, *Davis* v. *Board of School Commissioners,* 402 U.S. 33 (1971), have served well over the past eight years in guiding courts and school districts in desegregating numerous schools. Since hundreds of school districts with a combined enrollment in the hundreds of thousands are presently operating under court-ordered desegregation plans based on *Swann,* overruling or limiting *Swann* would call into question the validity of every one of these plans. *Stare decisis* carries more than its ordinary force here, where the original rule is well-grounded in logic and equity, has proven fair and workable, and has not been shown to lead to an unjust result.

A. The East Oak Cliff Subdistrict

1. The record before the district court included testimony that plaintiffs' plan A and the N.A.A.C.P. plan were designed to desegregate all of the East Oak Cliff schools (III Tr. 293 (1976); IV Tr. 41 (1976)). The NAACP plan would have employed bus trips, in each direction, of approximately 40 minutes to accomplish this (IV Tr. 53-54 (1976)). Plaintiffs' plan B was designed to desegregate more than half of the East Oak Cliff schools with maximum bus trips, in each direction, of 30 minutes (III Tr. 261 (1976)). The district court made no findings on the practicality of any of these plans. It nevertheless held (Pet. App. 31a) that no desegregation of the many all-black schools throughout the East Oak Cliff subdistrict could be accomplished "given the practicalities of time and distance, and the fact that the DISD is minority Anglo."

On appeal, the Fifth Circuit found (Pet. App. 137a) that the record included "no adequate-time-and-distance studies" to permit it to evaluate the district court's generalized finding that no desegregation of East Oak Cliff was practical. Accordingly, the court of appeals concluded (*ibid.*) that it had "no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still

existing." The court of appeals therefore remanded the case for more specific findings that would allow the appellate court to determine whether the remedial decree achieved the maximum degree of desegregation that would be practical. The remand order was necessary to permit both the district court and the court of appeals to perform their respective functions. See *Dayton I, supra*, 433 U.S. at 417-419; *Brown* v. *Board of Education*, 349 U.S. 294, 299-300 (1955).

2. The Curry petitioners suggest a second ground —not relied upon by the district court—for excluding the East Oak Cliff schools from any remedial order.[40] They argue that the all-black schools throughout East Oak Cliff are the result of residential segregation, not the actions of the DISD. The only evidence supporting this claim is Superintendent Estes' testimony that 19 schools—among them 12 of the 26 schools in East Oak Cliff—had become all-black between 1965

[40] The district court grounded its decision not to extend its remedial order to the East Oak Cliff schools solely on "the practicalities of time and distance, and the fact that the DISD is minority Anglo" (Pet. App. 31a). The Curry petitioners nevertheless contend (Curry Br. 9-10, 29) that in its August 17, 1971 order, partially staying an earlier order, the district court found that the primary cause for the one-race schools in East Oak Cliff was residential segregation. Petitioners make far too much of this comment, on which the district court itself did not subsequently rely. Indeed, the district court could not properly have relied on such a finding to deny relief throughout the subdistrict since the only evidence that might conceivably support such a finding related to some—but not all—of the schools in the subdistrict. See pages 44-45, *infra*.

and 1970 because of residential changes (II Tr. 514-520 (1971)).

The DISD introduced Estes' testimony in an effort to show that the DISD was not responsible for any of the current segregation throughout the school district. The district court rejected this argument on grounds that answer as well the Curry petitioners' more limited argument regarding East Oak Cliff. The district court found Superintendent Estes' testimony about 19 of the more than 170 schools in the district unpersuasive because it provided no explanation whatsoever for the existence of 97 other one-race schools throughout the DISD. Similarly, as applied to East Oak Cliff alone, Estes' testimony is unpersuasive because it provides no explanation for the majority of the schools in East Oak Cliff, including many schools that were black schools before the first court-ordered desegregation.[41]

Moreover, evidence that black residents moved to an area, such as East Oak Cliff, including an enclave of schools designated for many years as black schools in a dual school district does not prove that the schools affected by the changes in residential patterns were not also affected by the longstanding pattern of segregation in the schools. Particularly where, as here, the dual system had not been completely dismantled, this evidence of residential change

[41] Nine schools in East Oak Cliff are identifiable as black schools before 1965 because they had all-black faculties, including some that opened with all-white faculties and were subsequently converted to all-black faculties (see Respondents' Br. 81 n.47 for a listing of these schools).

affecting some schools would not overcome the presumption against the continuance of one-race schools. See *Columbus Board of Education* v. *Penick*, *supra*, slip op. 14-15 n.13.

B. Grades 9-12, K-3 outside East Oak Cliff

1. The district court also made a general finding that it would not be feasible to reassign students in order to desegregate any of the one-race high schools throughout the city (Pet. App. 33a-35a). But as the court of appeals pointed out (Pet. App. 137a), this finding seems to be clearly at odds with the district court's conclusion that it was feasible to desegregate the junior high schools throughout the district. Under the district court's plan, the high schools generally had substantially larger enrollments and drew students from larger geographic areas than the junior high schools (compare Pet. App. 88a, 95a, 102a, 109a, and 115a with 90a, 97a, 104a, 111a, and 117a).[42] The district court's plan used pairing, clustering, and transportation of students to desegregate the smaller schools serving the seventh and eighth grades, yet the district court found—without further explanation—that it could not desegregate the larger high school districts. As a logical matter, however, desegregation of the high schools should have been an easier task, since they served larger geographic areas.

Finding that the district court's failure to desegregate the high schools left one-race schools in three of

[42] Grades 7 through 12 are combined in Seagoville subdistrict (Pet. App. 119a).

the five integrated subdistricts, the court of appeals again directed the district court "to evaluate the feasibility of adopting the *Swann* desegregation tools for these schools, and to reevaluate the effectiveness of the magnet school concept" (Pet. App. 138a; footnote omitted). Mindful of the generalized nature of the findings in the opinion before it, the court of appeals stressed (*ibid.*) that "[i]f the district court determines that the utilization of pairing, clustering, or the other desegregation tools is not practicable in the DISD, then the district court must make specific findings to that effect." In view of the district court's failure to make the findings necessary to support the conclusion that desegregation of the high schools throughout the DISD was not practical, this portion of the remand order was also fully justified.

2. Finally, the district court observed (Pet. App. 32a) that Superintendent Estes had testified that children in grades K through 3 should be allowed to attend their neighborhood schools because they "had not matured sufficiently to cope with the problems of safety and fatigue associated with significant transportation." The court held (*ibid.*) that "this conclusion is sound, in terms of age, health, and safety of children in grades K-3," and accordingly the court excluded those grades from its desegregation plan.

In making this generalized finding, the district court took no account of the fact that some of the elementary attendance zones in the DISD were quite large and some pupils were already being trans-

ported (II Tr. 452 (1971)). Nor did the district court consider the possibility of using pairing and clustering and allowing the transportation of students in grades K through 3, but placing stricter limitations on travel time for children in the lower grades. And the record included no time and distance studies showing that desegregation of students in grades K-3 would be impractical if travel times were carefully limited because of the students' age.

The district court's plan left intact 53 elementary schools in which grades K through 3 were in excess of 90% Anglo or 90% minority. This group includes 21 schools outside East Oak Cliff that have had an enrollment of black students, or of black and Mexican-American students, in excess of 90% since 1966-1967, the first year for which the DISD supplied enrollment data by race.[43] Since the district court's general findings were insufficient to show that it would not be practical to desegregate some or all of these one-race elementary schools, the court of appeals' remand for reconsideration and more specific findings as to these schools was appropriate.

C. The use of student transportation

The Curry petitioners contend (Curry Br. 31-49) that the district court erred in approving the use of student transportation (or "mandatory busing"), and that the court of appeals compounded this error by remanding the case for consideration of techniques

[43] See note 19, *supra*.

that would require still more student transportation. Both they and the DISD argue that busing encourages white flight, thereby increasing racial isolation, and does not improve academic achievement on the part of minority students.[44] Respondents introduced substantial evidence controverting the Curry petitioners' claims, including evidence that student transportation does not have an adverse educational impact (IX Tr. 290-291 (1976) (testimony of Dr. Evans); IX Tr. 354-355 (1976) (testimony of Dr. Feagin)).

The district court properly declined (Pet. App. 34a n.50) to resolve the so-called "battle of the sociological experts," observing that *Brown* v. *Board of Education*, *supra*, 349 U.S. at 300, establishes that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement

[44] The Curry petitioners also argue (Curry Br. 31) that the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, "prohibit[s] [the] imposition of busing as a so-called remedial action to attain racial balances in schools." The Equal Educational Opportunities Act does provide that "[t]he failure of an educational agency to attain a balance, on the basis of race * * * of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws," 20 U.S.C. 1704, but the Act does not relieve school officials of their duty to convert a dual system—with separate schools for white and black students—into a unitary system. To the contrary, Section 204 of the Act, 20 U.S.C. 1703, provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race * * *, by—* * * (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system."

with them." The district court also recognized (Pet. App. 34a n.50) that this Court's prior opinions require the adoption of "the plan which promises realistically to be most effective." See *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 491 (1972).

Despite the district court's hope that the magnet schools would be an effective means of desegregation, in 1979, three years after adoption of the district court's plan, less than 10% of the high school students in the DISD attended magnet schools (1979 DISD Report to the District Court). Since the portions of the district court's plan that did not include student reassignments were not achieving desegregation, the court of appeals properly required the district court to reassess the effectiveness of magnet schools and to consider the feasibility of using techniques, including student transportation, that had been effective in many other cases to convert dual school systems to unitary systems free of the vestiges of state-imposed segregation. Since *Swann* this Court has consistently approved the district courts' use of student transportation as one tool to achieve desegregation when "a constitutional violation of sufficient magnitude has been found," *Columbus Board of Education, supra*, slip op. 2 (Burger, C.J., concurring), and it should continue to do so unless the parties propose other means that will achieve as much or more desegregation. Petitioners have failed to do so here.

Moreover, petitioners' attack on the use of busing as a remedy is premature where, as here, no final order has been approved and the degree of student

transportation that will be required has not yet been determined.

The Brinegar petitioners urge (Brinegar Br. 35-41) that the plan ultimately adopted by the district court should not require student reassignments and transportation in the residentially integrated area where they reside. This contention is also premature, since petitioners themselves concede (Brinegar Br. 36) that the district court has to date attempted to leave neighborhood schools intact in residentially integrated areas. Moreover, the court of appeals' remand does not jeopardize the continued existence of these neighborhood schools so long as the DISD implements a plan that effectively eliminates the remaining vestiges of the dual system where those vestiges still exist.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

SARA SUN BEALE
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MILDRED M. MATESICH
Attorneys

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